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No. 482

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, *Petitioners*

v.

TAFT B. SCHREIBER and MCA INC.

BRIEF OF TAFT B. SCHREIBER AND MCA INC. IN OPPOSITION

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OPINIONS BELOW

The opinions of the Court of Appeals (Pet. App. A, pp. 13-57) are reported at 329 F. 2d 517. The opinion of the District Court appears at 201 F. Supp. 421.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. B, p. 58) was entered on February 17, 1964. A timely petition for rehearing *en banc* was denied (Pet. App. C, p. 59) on May 4, 1964. On August 3, 1964, the Chief Justice granted Petitioners an extension of time within

which to file a petition for a writ of certiorari to and including September 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Where the record evinces the Federal Communications Commission's intention to probe deeply during an investigatory hearing into the activities and operations of respondent MCA, a company which is in a highly competitive industry and one in which trade secrets are of great importance and which company is not subject to the regulatory jurisdiction of the Commission, did the Court of Appeals err in refusing to reverse the District Court Order (made after a thorough review of the voluminous record) which required that all further information adduced from respondents be held in confidence until the interrogation of respondents had been completed and the questions and answers could be placed before the District Court in the context of the entire record, at which time the District Court would entertain a motion by the Commission to permit the disclosure of the information so elicited?

STATUTES INVOLVED

The pertinent portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, and the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001 *et seq.*, are set forth in Appendix A, p. 15.

STATEMENT

Taft B. Schreiber is Vice-President of MCA Inc. and President of Revue Studios, a division of MCA. Revue Studios engages in the production of filmed television shows and leases studio facilities to other producers.

MCA (primarily through subsidiaries) also distributes television shows to networks and television stations, and at the time of the Commission's hearing represented artists and production companies in various branches of the entertainment industry. There is no dispute that there is now, and has been, vigorous competition in each of these fields. MCA owns no television or radio stations and neither it, nor any of its subsidiaries or related companies, is a licensee of, or subject to, regulation by the Federal Communications Commission.

The present controversy between appellees and the Commission arises out of a broad Commission investigation of the television industry. The investigation has been under way for a number of years and under various directives. The present inquiry stems from an Order of the Commission released on February 27, 1959, FCC 59-166 [Pet. Ex. 1], which directed an inquiry into the "policies and practices pursued by the networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing of programs for television exhibition". This Order was supplemented by a Commission Order released on November 10, 1959, FCC 59-1136 [Pet. Ex. 3], which directed that the inquiry be enlarged to embrace "policies, practices, mechanics and surveillance pursued and carried out by networks, station licensees and others in connection with the acquisition, ownership, production, distribution, selection, sale and licensing of programs for radio and television exhibition. . . . "

In response to a subpoena duces tecum, Shreiber appeared in person at the Commission's hearing in Los Angeles. He produced certain subpoenaed material but declined to produce other material unless

it be accepted in confidence. After an exchange between Commission counsel and Schreiber failed to clarify to the former's satisfaction what Schreiber meant by "in confidence", the attorney for respondents attempted to state their legal position. The Hearing Examiner cut him off immediately, citing so-called "ground rules" which the Hearing Examiner had earlier promulgated *ex parte*. These "ground rules", as enunciated by the Hearing Examiner, provided that counsel could not advise a witness unless the lay witness recognized a need to consult with his counsel and secured permission from the Examiner to consult with his attorney (a permission not always given[1]); counsel could not volunteer information to the witness, could not initiate advice to the witness that a question or area of inquiry was improper, and could not make objections and could not make any statements whatsoever during the course of interrogation. When respondents' attorney attempted to have the record indicate the position of his clients on these critical points, the Hearing Examiner threatened to have respondents' attorney held in contempt for speaking at all. Schreiber thereupon refused to give further testimony.[2]

The Hearing Examiner thereafter reaffirmed his intention to follow the "ground rules" and further found that respondents' contention that the material sought by the Commission was confidential "to be without merit". On appeal from the Hearing Examiner's rul-

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[1] See for example Tr. 4646-4647.

[2] These events are reported in the transcript of the hearings, pages 4925-4935. The numerous individual volumes which contain the transcript are included with Petitioner's Exhibits 15A through R. References to the transcript are to "Tr." followed by the specific pages.

ing, the Commission affirmed the Hearing Examiner in all respects and left to the Hearing Examiner the responsibility for determining the extent of confidentiality to be accorded to the material elicited from respondents.

Prior to the time set for the reconvened hearing, respondents' attorney moved that the subpoena be quashed. He suggested, however, that, in order to avoid a needless expenditure of time and effort on the part of all concerned, Schreiber be permitted in the first instance to testify in a closed session and that the information so received be held in confidence until the courts should have an opportunity to rule on respondents' contentions; should the Commission prevail, the information could be made public without any further action. This alternative was rejected by the Commission. At the resumed hearing, the Hearing Examiner reaffirmed his insistence that the "ground rules" continue to apply. When Schreiber declined to testify under the duress of such "ground rules", the Hearing Examiner warned Schreiber of the possibility that the criminal penalties provided in Section 409(m) of the Communications Act of 1934, 48 Stat. 1096, as amended, 47 U.S.C. Section 409(m), would be invoked.

Upon Schreiber's refusal to retreat from his position that he and the company he represented were entitled to the meaningful assistance of their counsel and that the information being sought from him should not be made public, the Commission filed a petition in the United States District Court for the Southern District of California for enforcement of its subpoena and Orders. After two hearings the District Court signed a set of Findings, Conclusions and Order. Finding XI [R. 274-275] reads as follows:

"The record herein, including but not limited to, the testimony in the extensive hearings held by the Commission in its network programming inquiry, make it necessary that in protection of respondents' rights and to preclude disclosure of trade secrets of which competitors might take advantage, all further interrogation of, and all further testimony given by, respondents shall be given in non-public sessions, and shall be retained and maintained in confidence by the Commission."

The Disctrict Court's Order [R. 279-280] required, among other things, that:

"[A]ny further interrogation of respondents and any documents produced by respondents be taken and held by the Commission in private and confidential session, that the public be excluded therefrom, that all testimony adduced and documents produced be maintained in confidence by the Commission, that the Commission by motion duly made and served, may move the Court upon the conclusion of such interrogation and production for an order, should good cause exist therefor, permitting such testimony and documents to be made public, and that respondents shall retain the right to oppose such motion if and when so made.

IT IS FURTHER ORDERED that in the course of any further interrogation of respondents:

(a) . . . .

(b) Respondents shall have the right to have counsel accompany respondents when testifying, the right to have respondents' counsel object to any questioning by the Commission, its counsel or the Hearing Examiner deemed improper by respondents' counsel, the right to have counsel for respondents present on the record concise grounds and reasons for any such objection, and the right to have counsel for respondents, without inter-

> ference by the Commission, its counsel or the Hearing Examiner, initiate advice to his client with respect to the propriety or legality of any question asked of his client and to advise his client not to answer any such question deemed improper."

On appeal a divided Ninth Circuit held that Section 6(a) of the Administrative Procedure Act, 60 Stat. 240 (1946), 5 U.S.C. §1005(a) did not require that respondents be afforded the right to counsel as outlined in the District Court's Order, and modified the Order accordingly; however, by the same division, the Ninth Circuit upheld the District Court's Order with respect to confidentiality. In ruling on the confidentiality issue, the majority stated [Pet. 27]:

> "We hold, therefore, that the Trial Judge did not abuse his discretion; but, on the contrary, established a fair and just procedure whereby a most important investigation could proceed without being unduly disrupted, obstructed or prolonged, and at the same time afford appellees protection against the improvident disclosure of possible valuable trade secrets."

Notwithstanding the Ninth Circuit's ruling pertaining to the right to counsel, the Commission on September 2, 1964, adopted an amendment to its Rules and Regulations [Pet. 64-65] which guarantees to witnesses before it the right to counsel to which respondents have contended throughout they were entitled under Section 6(a) of the Administrative Procedure Act. In reliance upon the advice of the General Counsel of the Commission that the amended rule applies in any subsequent hearing, respondents have not petitioned for *certiorari* from that portion of the Ninth Circuit's Order which pertains to the right to counsel.

ARGUMENT

The courts below were clearly correct in qualifying the Commission's process to require that in the first instance testimony to be obtained from respondents be held in confidence pending a later court determination. The decisions do not conflict with the decisions of this Court or other courts of appeals and no questions of general importance are raised by the petition. Moreover, consideration by this Court would, at the present time, be premature. Therefore, review by this Court is not warranted.

1. The Ninth Circuit did not err when it upheld the sensible approach of the District Court in the course of enforcing the Commission's Orders. The record before the District Court amply supports its Finding of Fact XI [R. 274-275] that it is necessary in the protection of respondents' rights and to preclude disclosure of trade secrets of which competitors might take advantage that further interrogation of the respondents be conducted in non-public sessions, and that the evidence adduced thereby be held in confidence, and amply supports it Order [R. 279-280] to the effect that the Commission could, if good cause existed, obtain an Order from the District Court permitting such evidence to be made public. The record reveals a concerted effort on the part of the Commission to delve deeply into the business affairs of MCA. The very Order which the Commission sought to have the District Court enforce without qualification [Pet. Ex. 12, p. 7] sets the tone for the proceeding by directing that the "policies, practices and activities of MCA Inc. in connection with the production, casting, packaging, selection and sale of programs for television exhibition" be inquired into during the course of the hearing.

Prior to respondent Schreiber's taking the stand, numerous questions were put to witnesses concerning their competitive and other relationships with MCA [e.g. Tr. 4019-4021, 3979-3980, 4273-4278, 4339-4343, 4437-4438]. The Commission also introduced into evidence detailed financial and corporate data concerning MCA [e.g. Pet. Ex. 10]. Respondents are unaware of any other occasion during the hearings when even remotely comparable material pertaining to other companies was placed in the public record. Many other occurrences which are part of the record buttress the District Court's conclusion that respondents were well grounded in their concern that "the testimony to be given might result in disclosure of trade-secrets, of which competitors might take advantage. . . ." 201 F. Supp. 421 at Page 425. Indeed, the Commission has even stated that one of the purposes of disclosure is to make available to station licensees, the broadcast industry, and the public (as well as to the Commission and to Congress) information concerning the "processes involved in the production, sale, distribution, et cetera, of broadcast programming. . . ." [Pet. Ex. 12, p. 2]

The District Court was faced with a situation in which a hearing ostensibly aimed at the television industry as a whole, in fact appeared to have been focused upon MCA. Neither at its own proceedings nor before the District Court, nor before the Ninth Circuit, nor in its petition to this Court, has the Commission given any indication of an intention to limit its inquiry to anything less than the broad areas delineated in its various Orders.

The Government argues that the information sought from respondents is needed so that the Commission

may intelligently regulate the television industry and make recommendations to Congress [Pet. 8]. The Petition implies that the Commission cannot perform this function in the face of an authorization by the Circuit Court of Appeals to the District Court to "exercise its discretion on the issue of confidentiality *vel non* irrespective of the prior decision of the Commission" [Pet. 9]. This is not the case. The District Court was faced with a situation where the Commission's Rules made no provision for a hearing on respondents' claim as to confidentiality. Moreover, respondents' offer to supply this information, initially on a confidential basis, subject to a ruling by the District Court, was summarily rejected by the Commission. The Commission, without knowing what the information was, declared, in effect, that a judgment could be made that the confidential treatment was unwarranted. The Commission even went so far as to seem to require a full *public* disclosure of the material in question in order to rule on whether or not it was confidential. The District Court refused to accept such a one-sided and illogical appraisal. Instead, it carefully evaluated the interests involved and issued an Order which was calculated to avoid delays in any subsequent proceedings while at the same time protecting MCA from any unwarranted interim disclosure of competitive information. The Commission was left free to proceed with all phases of its investigations, except for the sensible requirement that it maintain in confidence sensitive competitive data until such time as the District Court, with the aid of the entire record, would have an opportunity to learn what specific information was involved.

2. The decision of the Ninth Circuit is consistent with the decisions reached by other Courts of Appeals

and by District Courts in other circuits and does not conflict with any decision of this Court or of any Court of Appeals. The Government asserts [Pet. 10] that the "approach" of the Ninth Circuit conflicts with that of the District of Columbia Circuit in *American Sumatra Tobacco Corp.* v. *Securities and Exchange Commission*, 110 F. 2d 117 (D. C. Cir. 1940).[3] The Government misreads *Sumatra*. In that case, a company subject to the jurisdiction of the SEC requested the Commission to maintain in confidence certain financial information filed as part of a registration statement. The SEC pursuant to published rules and regulations held a hearing on this question, in the meantime keeping the information confidential. After a hearing the SEC concluded that the information should be made public. An appeal was thereupon taken to the Court of Appeals. That Court, after reviewing the entire record, sustained the Commission's action. It is apparent that the Court of Appeals placed great reliance on the fact that the whole scheme of the Securities Act depended upon public disclosure of filed information and also upon a procedure which specifically permitted the filing of the information in the first instance on a confidential basis, subject to public disclosure only after a hearing by the agency and after judicial review of the agency order by the Court of Appeals.[4] In the instant case, MCA is not subject to regulation by the Commission, the regulatory scheme does not rely primarily upon a disclosure concept, and no administra-

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[3] The other cases cited by the Government [Pet. 11] merely contain general statements relating to the responsibility of agencies to formulate their procedures.

[4] See *American Sumatra Tobacco Corp.* v. *Securities and Exchange Commission*, 93 F. 2d 236 (D. C. Cir. 1937).

tive procedure was available for receiving in the first instance the challenged information in confidence, subject to disclosure only after an administrative hearing and judicial review.

The decision of the Ninth Circuit in the case at bar, upholding the District Court's ruling with respect to confidentiality, is consistent with numerous cases which have recognized the need to qualify the processes of administrative agencies in order to avoid the great harm which may befall private parties from the unwarranted disclosure of business data. See, for example, *Bank of America Nat. Trust and Sav. Ass'n.* v. *Douglas,* 105 F. 2d 100 (D. C. Cir. 1939) which, like the *American Sumatra* case cited by the Government, was decided by the District of Columbia Court of Appeals. See also, *Federal Communications Commission* v. *Cohn,* 154 F. Supp. 899, 912-3 (S.D.N.Y. 1957); *Federal Trade Commission* v. *Menzies,* 145 F. Supp. 164, 171 (D. Md. 1956); *aff'd without point being in issue,* 242 F. 2d 81 (4th Cir. 1957), *cert. denied,* 353 U.S. 957 (1957); *Federal Trade Commission* v. *Bowman,* 149 F. Supp. 624 (N.D. Ill. 1957) (contention by defendant that "disclosure of confidential business information . . . might prove beneficial to competitors if made public" basis for requiring information to be held in confidence), *aff'd without point being in issue,* 248 F. 2d 456 (7th Cir. 1957).

3. Review by this Court at this time is not appropriate. The District Court's Order does not specify what information, if any, must be held in confidence for an indefinite period of time. It was in no position to make such a determination without having the questioned information before it. For that issue to be presented properly to the District Court, the hearing

before the Commission would have to be resumed, questions would have to be put to respondents which respondents contend would result in unwarranted disclosure of information, and the Commission would have to disagree. Then with specific information contained in a record, the Commission could petition the District Court for an Order authorizing it to make public the information so elicited. If the District Court were to rule unfavorably upon the Commission's petition, then, for the first time, would the Commission be aggrieved in any practical way. At that time, with both the specific information involved and with the District Court's explanation of the standard applied by it, an appellate court could ascertain whether the District Court had erred. Until this point is reached, the dispute is largely academic and accordingly it would be premature for this Court to consider the case.

On the state of the current record, this Court could obviously not decide in advance what information, if any, to be elicited in the future from respondents would be entitled to confidential treatment. Indeed, in the state of the current record it is unlikely that any broad criteria could even be enunciated with respect to this matter. Even if the judgment of the lower court were to be reversed, respondents would still have the right at the public hearing to refuse to answer specific questions until the courts would have had an opportunity to pass upon the issue of confidentiality. Accordingly, review by this Court at this time would not move the matter any closer to resolution.

CONCLUSION

The adoption by the Commission of rules of procedure with respect to the right to counsel which are in accord with respondents' legal position on this

matter has eliminated from this case the only important issue. As to the matter of confidentiality, the Government does not question the District Court's authority to impose safeguards in the course of enforcing agency process; the Government merely questions the propriety of the particular safeguards imposed by the District Court in this particular case. We believe these safeguards are necessary, appropriate and consistent with good sense and orderly procedure. Moreover, review at this time—when the information in question is not before the Court—is premature. Finally, because of the nature of this case and because of its present procedural status, any decision this Court might render, were it to grant the Government's petition, would not have any general applicability and would not serve as a meaningful guideline in the future either to lower courts or to administrative agencies. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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October 12, 1964

APPENDIX A

Statutes Involved

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 151 *et seq.*:

* * * * * * * * * * *

Section 6(a): *Appearance.*—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of agency business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*:

* * * * * * * * * * *

Section 409(m): Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or, to produce books, papers, schedules or charges, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of a misdemeanor and upon

conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $100 nor more than $5,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.